STATE OF MICHIGAN

COURT OF APPEALS

VED SOFTWARE SERVICES, INC.,

Plaintiff-Appellant,

v

SURESH E. GOPALAN,

Defendant-Appellee.

UNPUBLISHED
June 23, 2005

No. 252063
Oakland Circuit Court
LC No. 2002-039173-CK

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders that granted defendant's motion for summary disposition. We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is a contract professional services company providing clients with employee staffing. Plaintiff employed defendant as a systems analyst from November 1999 until July 2001. During that time, plaintiff placed defendant with different clients, who in turn placed him with different end users. To ensure employee loyalty, plaintiff had defendant sign a standard contract promising not to take a position or otherwise conduct any business, directly or indirectly, with any of plaintiff's clients or end users for a period of two years after leaving plaintiff's employ. Within two years after his employment with plaintiff ended, defendant accepted employment with a company. Plaintiff filed suit, alleging that the company was an end user that it had assigned defendant to during his employment with plaintiff. Defendant asserts that it is the parent company of one of the end users, so there is no breach of the contract.

Plaintiff's complaint identifies the offending end user as "IMckesson, MA." By defendant's account, his placements with plaintiff included work for "i.McKesson, L.L.C.," which in turn is owned by "McKessonHBOC," which employed him. According to an unsworn statement by plaintiff's human resources manager, "Plaintiff called Defendant at his workplace

at various times after August 14, 2001 using the same telephone number which Plaintiff used to contact him during his employment with Plaintiff."[1]

The trial court cast the question as whether "McKessonHBOC is an existing or former end-user of Plaintiff's," acknowledging that defendant did accept employment with that company. The court noted evidence that defendant was placed through plaintiff's intermediary on a project labeled "McKessonHBOC-INTERQUAL," those services being ultimately billed to "i.Mckesson, LLC." The court also acknowledged that "[i]t appears that the McKesson companies are related," but found that the agreement did not extend to plaintiff's end user's "parent, subsidiary or affiliate companies." We disagree. "We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ." *Id.*

Whether the status of plaintiff's end user extends to a company related to such an end user depends on the factual nature of that connection. The employment agreement contains a provision labeled "COVENANT NOT TO WORK FOR CLIENTS OR END USERS", which states in relevant part:

> [Defendant] absolutely and unconditionally represents and agrees that . . . for a period of two (2) years after [defendant's] engagement with [plaintiff] is terminated . . . he will not . . . [d]irectly or indirectly . . . transact, carry on, solicit, perform, accept, . . . engage in or conduct any business dealings with existing or former End Users. An End-User is any business or company where [defendant] is placed or works while on the payroll of [plaintiff] regardless of whether [defendant] was placed with the business directly by [plaintiff] or indirectly through an intermediate company. An End User directly utilizes a company employee service and is usually where an employee is physically located.

In this case, defendant admits in his affidavit that his employer once owned the similarly named company where he was assigned while working for plaintiff. This presents strong evidence that defendant is indirectly performing services for one of plaintiff's "end users." Furthermore, it is undisputed that defendant retained a phone number in his new employment that he had used while placed by plaintiff. Although the same phone number does not necessarily mean the same location, that common element between work stations strongly suggests a substantial overlap in identity between defendant's past and ostensibly new employment situations. Together with the obvious similarities between the corporate names, including the court's own recognition that the various McKesson entities appeared to be related,

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[1] Defendant argues that this unsworn statement does not qualify as an affidavit. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000). Nevertheless, defendant did not refute the statement, so we consider it an undisputed assertion with no more weight than an allegation in a pleading.

brings to light a question of material fact concerning whether the distinction between the McKesson entity to whom plaintiff sent defendant, and the McKesson entity from whom defendant accepted employment immediately after finishing with plaintiff, is more a matter of form than of substance.

Reversed and remanded for further proceedings on plaintiff's claim for breach of employment contract. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello